

Commission grants reconsideration of its order and adopts Staff's recommendation as follows:

The advertising requirements are to be applied only to print advertising that is designed to reach those customers in a CETC's designated service area. However, if a CETC chooses not to advertise through print in its designated area, the advertising requirements must be met through another form of advertising.

III. Free Optional Per Minute Blocking for Lifeline Customers

26. In its Order, the Commission directed CETCs that do not provide unlimited local usage to offer free per minute blocking of local usage to Lifeline customers within 90 days.

27. Sprint argues that the decision by the Commission to require ETCs to offer per minute blocking of local usage amounts to rate regulation and violates 47 U.S.C. § 332(c)(3)(A) which prohibits state government from regulating entry or rates of wireless carriers.³⁰

28. RCC and USCOC also argue that the Commission's requirement that wireless ETCs either offer unlimited local usage or per minute blocking violates the prohibition against regulating a wireless carrier's rates.³¹ RCC and USCOC state that such a requirement precludes wireless carriers from charging by the minute for overage.³² RCC and USCOC argue that Lifeline customers have competitive choices that will enable them to select plans to avoid per minute charges.³³

29. Staff explains that no evidence has been presented of the cost, if any, of implementing free per minute blocking of local usage to Lifeline customers.³⁴ Staff states the purpose of this requirement is to assist Lifeline customers in the management of their

³⁰ Sprint Petition at ¶23.

³¹ RCC and USCOC Petition at ¶ 4.

³² RCC and USCOC Petition at ¶ 4.

³³ RCC and USCOC Petition at ¶5.

³⁴ Staff Response at ¶11.

telecommunications bills.³⁵ Staff argues that the per minute blocking requirement is consistent with the FCC's requirement that LECs block toll in order to increase the likelihood that Lifeline customers remain on the telecommunications network.³⁶ Staff states that requiring optional per minute blocking is critical when a carrier does not offer a Lifeline customer a choice in plans. Staff notes that Sprint has requested reconsideration of the requirement in the Order that carriers offer Lifeline customers a choice in plans.³⁷

30. Sprint argues that the per minute toll blocking requirement amounts to an impermissible regulation of interstate services. Sprint argues that the interstate and intrastate portions of its plan are inseparable; therefore, the Commission cannot regulate those offerings.³⁸ Sprint cites to a Colorado Federal District Court opinion for support of its position that wireless carriers cannot separate intrastate and interstate services.³⁹

31. Finally, RCC and USCOC voice concern that compliance with this requirement will be difficult, if not impossible. RCC and USCOC state they do not currently offer an unlimited local usage option, so it is exploring compliance with the requirement to offer optional per minute blocking. RCC and USCOC state that it is uncertain at this time whether such an option is achievable.⁴⁰

32. Staff maintained its support for the optional per minute blocking requirement, stating that the requirement has merit. However, Staff states that additional information is required before the Commission affirms its decision.⁴¹

³⁵ Staff Response at ¶12.

³⁶ Staff Response at ¶12.

³⁷ Staff Response at ¶14.

³⁸ Sprint at ¶32.

³⁹ Sprint Petition at ¶33 citing to *WWC Holding Company, Inc. v. Sopkin*, 420 F. Sup. 2d 1186, 1197 (D. Colo. 2006).

⁴⁰ RCC and USCOC Petition at ¶6.

⁴¹ Staff Response at ¶14.

33. Given the arguments presented on reconsideration, the Commission agrees to reconsider its requirement that CETCs offer optional per minute blocking to Lifeline subscribers if they do not offer unlimited local calling. The reconsideration is granted to obtain additional information. The Commission seeks additional comment on whether it is technically feasible for CETCs to offer per minute blocking. Additionally, comments are requested that address the incremental cost of such blocking. Comments may address other issues related to per minute blocking. Comments are due December 20, 2006. Reply comments are due January 12, 2007.

IV. Calling Plan without a Termination Fee

34. In its Order, the Commission required all ETCs to offer at least one service plan that does not include a termination fee. The Commission required CETCs to advertise the availability of such a plan.

35. RCC and USCOC and Sprint seek reconsideration of this requirement. Both argue that this requirement violates the prohibition against state regulation of rates.⁴² RCC and USCOC argue that the Order ignores the fact that termination fees are integral part of a wireless carrier's rate structure.⁴³

36. RCC and USCOC state that terminations fees are essential as a mechanism to defray costs of discounting customer equipment.⁴⁴ Also, according to RCC and USCOC, choices already exist for those customers that do not want subsidized handsets. RCC and USCOC state that many wireless carriers offer a month-to-month contract and prepaid service to customers paying an unsubsidized price for the handset.⁴⁵

⁴² 47 U.S.C. § 332(c)(3)(A).

⁴³ RCC and USCOC Petition at ¶ 10.

⁴⁴ RCC and USCOC Petition at ¶ 10.

⁴⁵ RCC and USCOC Petition at ¶ 12.

37. Sprint argues that the Commission's decision on this issue is not supported by

substantial evidence. Sprint states that the basis for the Commission's decision is the

dissatisfaction of customers with early termination fees.⁴⁶ Sprint stated that the statistical

evidence regarding complaints that the Commission relied on does not reflect the downward

trend in complaints regarding termination fees.⁴⁷ Sprint stated that the 2nd Quarter 2006 FCC

report identifies 486 complaint related to termination fees, as opposed to the over 1000

complaints in the 3rd quarter 2005 relied on by the Commission.⁴⁸

38. Sprint further argues that the CTIA Consumer Code for Wireless Service requires

advance notice of termination fees to customers and requires that carriers allow a customer at

least 14 days to cancel service without a termination fee.⁴⁹ Sprint notes that it provides

customers with a 30-day trial period.⁵⁰

39. Staff, noting that the additional evidence about consumer data was not in the

record when the Commission issued its Order, recommended that the Commission reconsider its

Order requiring ETFCs to offer at least one plan without a termination fee.⁵¹ Staff states that plans

that require a carrier to obtain a handset separate from the service plan and without a termination

fee achieve the same goal as the Commission's requirement on this issue.

40. The Commission agrees with Staff's recommendation. Given the arguments and

information presented in the Petitions for Reconsideration, the Commission reconsiders its ruling

that all ETFCs must provide a plan without a termination fee. The offering of such a plan will not

⁴⁶ Sprint Petition at ¶ 37.

⁴⁷ Sprint Petition at ¶ 37.

⁴⁸ Sprint Petition at ¶¶ 37-38.

⁴⁹ Sprint Petition at ¶¶ 41-42.

⁵⁰ Sprint Petition at ¶ 42.

⁵¹ Staff Response at ¶ 17.

be a requirement. Given that decision, the request to reconsider the requirement to advertise a plan without a termination fee is moot.

V. Allowing Lifeline Customers a Choice in Plans.

41. The Commission found that all ETCs shall allow Lifeline customers to select a plan and have the Lifeline discount applied to that plan. Most of the parties filing comments supported such a finding.⁵² RCC and USCOC stated it is its practice to allow Lifeline customers to select a plan and then apply the discount to that plan.⁵³ Sprint and Alltel now seek reconsideration of this part of the Commission's Order.

42. Sprint and Alltel both argue that the requirement that Lifeline customers be allowed a choice of plans conflicts with the FCC's rules. The rule at issue is 47 C.F.R. § 54.403(b), the relevant language of which states as follows:

Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount to reduce their lowest tariffed (or otherwise generally available) residential rate for the services ..., and charge Lifeline customers the resulting amount.

In its Order, the Commission agreed with Staff's interpretation that the "or otherwise generally available" language means that Lifeline support should be applied to plans other than the lowest tariffed residential rate.⁵⁴ Sprint and Alltel now argue that the parenthetical language is there because certain carriers do not have tariffed rates. They argue that the language was meant to ensure that Lifeline customers were enrolled in the "lowest tariffed" or "lowest generally available" residential rate.⁵⁵

⁵² Order at ¶ 64.

⁵³ Order at ¶64, RCC and USCO Comments at ¶52.

⁵⁴ Order at ¶66.

⁵⁵ Sprint Petition at 52, Alltel Petition at ¶9.

43. Sprint argues that the Commission's interpretation of the rule conflicts with the purpose of Lifeline and Link Up by requiring ETCs to make higher-cost plans available to customers.⁵⁶ Likewise, Alltel claims that the Commission's decision on this issue will provide an incentive to low income customers to spend limited resources on high cost plans.⁵⁷

44. Staff maintains that the Commission's interpretation of 47 C.F.R. § 54.403(b) is correct. As support for this interpretation, Staff points to language in the FCC's *Universal Service Order*⁵⁸ stating that "universal service principles may not be realized if low-income support is provided for service inferior to that supported for other subscribers."⁵⁹

45. Staff states that even if Alltel's and Sprint's interpretation of the rule is correct, the rule does not preclude the Commission from expanding the requirement.⁶⁰ Staff notes that expanding the requirement does not increase the burden on ETCs, pointing out that ETCs still maintain the ability to discontinue service to Lifeline customers that do not pay for services.

46. Finally, Alltel states that the Commission is the first in the many jurisdictions it operates to expand the applicability of Lifeline support beyond the lowest rate plan.⁶¹ However, Staff is aware of at least one jurisdiction, Utah, which requires ETCs to allow Lifeline customers to choose any plan.⁶²

47. The Commission will not reconsider its order directing ETCs to allow Lifeline customers to select which plan to apply the Lifeline discount. The Commission believes it is the public interest to ensure that Lifeline customers are not limited to one plan. The Commission notes that other carriers participating in this docket do provide a choice of plans to Lifeline

⁵⁶ Sprint Petition at ¶ 55.

⁵⁷ Alltel Petition at ¶ 11.

⁵⁸ In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, Rel. May 8, 1997, (*Universal Service Order*).

⁵⁹ Staff Response at ¶ 18 citing *Universal Service Order* at ¶ 28.

⁶⁰ Staff Response at ¶ 20.

⁶¹ Alltel Petition at ¶ 21.

⁶² Staff Response at ¶ 19, citing to Utah Administrative Rule R746-341.

⁷² RCC and USCOC Petition at ¶25.
⁷³ Staff Response at ¶25.
⁷⁴ Staff Response at ¶25.

advertising that is designed to reach those customers in a CETC's designated service area. If a reconsideration as follows. The advertising requirements are to be applied only to print

55. On the issue of the advertising requirements, the Commission grants

VIII. Summary of Decisions

this proceeding:

applicability to wireless ETCS in the docket opened to review the billing standards rather than in

determine whether agreement can be reached on standards. The better process is to determine

decide applicability. Parties are currently reviewing the billing standards and are working to

billing standards in this docket. As the Commission said in its Order, it would be premature to

54. The Commission will not reconsider whether to address the applicability of the

decide whether standards that are not yet determined should apply to wireless ETCS.

supported the Commission's decision to defer to docket 06-187, stating that it is premature to

apply to a procedural schedule will need to be established to address those issues.⁷⁴ Staff

to the extent agreement is not reached on standards and on which providers the standards should

to and what issues will need to be presented to the Commission for decision.⁷⁵ Staff stated that

addressed. Staff stated that the parties to that docket are determining what issues can be agreed

acknowledged that the issue of applicability of the standards to wireless ETCS has not been

53. Staff agreed that RCC and USCOC are participating in docket 06-187 and

venue for a determination.⁷⁷

will be sufficiently addressed in docket 06-187, and argue that the current docket is the best

CETC chooses not to advertise through print in its designated area, the advertising requirements must be met through another form of advertising.

56. On the issue of requiring optional per minute blocking to Lifeline subscribers, reconsideration is granted to obtain additional information. The Commission seeks additional comment on whether it is technically feasible for CETCs to offer per minute blocking. Additionally, comments are requested that address the incremental cost of such blocking. Comments may address other issues related to per minute blocking. Comments are due December 20, 2006. Reply comments are due January 12, 2007.

57. Given the arguments and information presented in the Petitions for Reconsideration, the Commission reconsiders its ruling that all IETCs must provide a plan without a termination fee. The offering of such a plan will not be a requirement. Given that decision, the request to reconsider the requirement to advertise a plan without a termination fee is moot.

58. The Commission denies reconsideration of its decisions to allow Lifeline customers to choose a plan and to have the Lifeline discount applied to that plan, its finding that CETCs must file two-year quality improvement plans on an annual basis, and its decision to address the applicability of the billing standards in docket 06-187.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Petitions for Reconsideration are denied in part and granted in part as set forth above.

B. Any party may file a petition for reconsideration of this order within fifteen days of the date this order is served. If service is by mail, service is complete upon mailing and three days may be added to the above time frame. K.S.A. 66-118; K.S.A. 2005 Supp. 77-529(a)(1).

C. To the extent that this order constitutes final agency action that is subject to judicial review, K.S.A. 77-607(b)(1), the agency officer designated to receive service of any petition for judicial review is Susan K. Duffy, Executive Director, K.S.A. 77-529(c).

D. The Commission retains jurisdiction over the subject matter and parties for the purpose of issuing such further order or orders, as it may deem necessary

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Comm.; Moffet, Comm.

Dated: NOV 20 2006

ORDER MAILED

NOV 20 2006

 Executive Director

Susan K. Duffy
Executive Director

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ATTACHMENT 6

therefore, seeks preliminary injunctive relief to maintain the *status quo* pending final adjudication of the validity of this decision.

In addition to demonstrating irreparable harm, Sprint's motion satisfies each of the additional criteria for the granting of preliminary injunctive relief. As further demonstrated in Sprint's Verified Complaint and motion papers, the balance of harms favors Sprint, preliminary injunctive relief will serve the public interest and Sprint is likely to succeed on the merits.

Sprint's counsel will attempt immediate service of the motion on the Defendants via fax and/or email once the Complaint and Motion have been filed and the case number has been assigned and will further attempt to notify Defendants by telephone of the motion as soon as possible.

Sprint requests that this Court issue a temporary restraining order effective immediately. Sprint further requests that this Court schedule a hearing on a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure during the period between consideration of Sprint's motion for a temporary restraining order and the time at which the temporary restraining order expires.

Respectfully submitted,

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*ATTORNEYS FOR PLAINTIFF
SPRINT SPECTRUM, L.P.*

ATTACHMENT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Sprint Spectrum, L.P.,

Plaintiff,

v.

Brian Moline, Robert Krebbiel and Michael
Moffet, in their Official Capacities as the
Commissioners of the Kansas Corporation
Commission,

Defendants.

CIVIL ACTION

No. 07-_____ - _____

**SPRINT SPECTRUM, L.P.'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR A TEMPORARY
RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

1. INTRODUCTION

The Kansas Corporation Commission's ("KCC") unprecedented decision to require all eligible telecommunications carriers ("ETC") operating in Kansas to apply federal Lifeline universal service support to reduce the cost of any rate plan offered by the carrier (hereafter, the "Kansas Lifeline Rule"), beginning March 31, 2007, will place Sprint Spectrum, L.P. d/b/a Sprint PCS ("Sprint") in the untenable position of having to violate federal law to satisfy this new State law requirement. Sprint seeks preliminary injunctive relief to maintain the *status quo* pending adjudication of the validity of this decision under federal law, without placing Sprint in legal jeopardy of choosing to violate federal or state law.

Specifically, the Kansas Lifeline Rule violates 47 U.S.C. § 254(f) and 47 C.F.R. § 54.403(b) because it is inconsistent with the Federal Communications Commission's ("FCC") determination that federal low-income universal service support must be applied to reduce the cost of an ETC's lowest-cost generally available residential rate.

As applied to a commercial mobile radio service ("CMRS") provider, like Sprint, the Kansas Lifeline Rule will further violate 47 U.S.C. § 332(c)(3)(A) because it would require Sprint to discount its rates without the ability to lawfully recover the subsidy from the federal universal service support fund.

To avoid this result, and to preserve the *status quo* pending final resolution of the issues presented in this proceeding, the Court should therefore issue a temporary restraining order and/or preliminary injunction preventing the enforcement of the Kansas Lifeline Rule until such time as the Court may issue its final decision.

II. FACTS

A. The Federal Universal Service Program

The Telecommunications Act of 1996, which amended the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (collectively, "the Act"), established a federal program to ensure that affordable telecommunications services are available to all Americans. 47 U.S.C. §§ 214 and 254. This policy objective is referred to as "universal service."

Congress determined that universal service goals would be accomplished through competition, and directed the Federal Communications Commission ("FCC") to create a federal universal service funding mechanism that would provide financial support to both incumbent and competitive telecommunications carriers that satisfy basic criteria established by the FCC. Carriers that qualify for such support are referred to as federal "eligible telecommunications carriers" or "ETCs."

The FCC began implementing Sections 214 and 254 of the Act when it issued its first universal service order in 1997. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Report and Order*, FCC 97-157, 12 FCC Rcd. 8776, 62 FR 32862

(rel. May 8, 1997) ("Universal Service Order"). The FCC's universal service regulations are set forth at Title 47, Part 54 of the Code of Federal Regulations, 47 C.F.R. § 54.1, *et. seq.*

As set forth at 47 C.F.R. § 54.101(a)(1)-(a)(9), the FCC designated the following core telecommunications services or functionalities to be supported by the federal universal service support mechanisms (hereafter, the "Supported Services"): Voice-grade access to the public switched telephone network; Local usage; Dual tone multi-frequency signaling or its functional equivalent; Single-party service or its functional equivalent; Access to emergency services; Access to operator services; Access to interexchange services; Access to directory assistance; and Toll limitation for qualifying low-income consumers.

B. State Administration of Federal Universal Service Programs

Section 214(e) of the Act provides that a State commission – here the KCC – has the authority to designate carriers as eligible to receive federal universal service support. Pursuant to this delegated authority, the KCC in 2000 designated Sprint as a competitive federal ETC for a defined geographic "service area"¹ within the State of Kansas. Sprint's designated service area covers only a portion of the State and is smaller than the Company's FCC-licensed service area in Kansas.

Section 254(f) of the Act further provides that a State may adopt additional regulations governing the provision of universal service within its jurisdiction, provided (1) any additional regulations are not inconsistent with the FCC's universal service rules, and (2) the State adopts a

¹ For purposes of universal service requirements, an ETC's designated "service area" is defined as the "geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. A service area defines the overall area for which the carrier shall receive support from federal universal service support mechanisms." 47 C.F.R. § 54.207(a) (emphasis added).

Medicaid, Food Stamps, Supplemental Security Income (SSI), General Assistance, Temporary Assistance for Needy Families (TANF) or the National School Free Lunch program. 47 C.F.R. § 54.409(a); *In the Matter of the Implementation of New Lifeline Service Program Eligibility Guidelines and Requirements*, KCC Docket No. 05-GIMT-1039-GIT, *Order Opening Docket and Establishing New Lifeline Service Program Eligibility Requirements and Guidelines* (May 19, 2005).² A resident of federally-recognized Tribal lands will be eligible for enhanced Lifeline and/or Link Up assistance if the applicant satisfies any of the forgoing criteria or participates in any of the following additional programs: Bureau of Indian Affairs General Assistance, tribally administered TANF or Head Start (based on income qualifying standards). 47 C.F.R. § 54.409(b).

2. Lifeline

The federal Lifeline program reimburses an ETC for providing qualified, low-income consumers a monthly discount off the cost of the carrier's lowest-cost residential rate plan. As set forth in the FCC's universal service rules, Lifeline is defined as "a retail local service offering: (1) [t]hat is available only to qualifying low-income consumers; (2) [f]or which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in [47 C.F.R. § 54.403]." 47 C.F.R. § 54.401(a) (emphasis added).

FCC Rule 54.403 defines both the amount of federal Lifeline support available and the limitations on the application of such support. Pursuant to 47 C.F.R. § 54.403, federal Lifeline

² In certain instances, the FCC's universal service regulations require a federal ETC to comply with State Lifeline/Link Up rules. These are limited to: State eligibility criteria (47 C.F.R. §§ 54.409(a) and 54.415(a)); State income certification procedures (47 C.F.R. § 54.410(a)(1)); State procedure to verify continued eligibility (47 C.F.R. § 54.410(c)(1)); State procedures for resolving disputes concerning eligibility and the termination of Lifeline assistance due to ineligibility (47 C.F.R. § 54.405(c)-(d)); and State recordkeeping requirements (47 C.F.R. § 54.417(a)).

support is comprised of four assistance credits or "Tiers." "Tier One" support is equal to the monthly "tariffed rate in effect for the primary residential End User Common Line charge³ of the incumbent local exchange carrier serving the area in which the qualifying low-income consumer receives service." "Tier Two" support is equal to \$1.75 per month. "Tier Three" support is equal to "one-half the amount of any state-mandated Lifeline support or Lifeline support otherwise provided by the carrier, up to a maximum of \$1.75 per month." If applicable, "Tier Four" provides up to an additional \$25 per month for an eligible resident of Tribal lands, provided the additional support does not bring the basic local residential rate below \$1 per month.

Application of the federal Lifeline support credits to a qualifying customer's basic residential rate is governed by 47 C.F.R. § 54.403(b), which provides in pertinent part:

Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges shall apply Tier-One federal Lifeline support to waive the federal End-User Common Line charges for Lifeline consumers. Such carriers shall apply any additional federal support amount to a qualifying low-income consumer's intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount, to reduce their lowest tariffed (or otherwise generally available)⁴ residential rate for the services enumerated in Sec. 54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount.

47 C.F.R. § 54.403(b) (emphasis added).

³ The "End User Common Line" charge is also referred to as the "Subscriber Line Charge" or "SLC."

⁴ CMRS providers, like Sprint, do not provide service pursuant to utility tariffs, but rather enter into individual service contracts with subscribers. 47 C.F.R. § 20.15(c). Accordingly, CMRS providers are obligated under FCC Rule 54.403(b) to apply the Lifeline discount to their lowest cost "generally available" residential rate.

In adopting the regulations discussed above, the FCC clarified that a federal ETC must apply the federal Lifeline support it receives to the carrier's lowest generally available residential rate for the Supported Services:

These rules require that carriers offer qualified low-income consumers the services that must be included within Lifeline service, as discussed more fully below, including toll-limitation service. ILECs providing Lifeline service will be required to waive Lifeline customers' federal SLCs and, conditioned on state approval, to pass through to Lifeline consumers an additional \$1.75 in federal support. ILECs will then receive a corresponding amount of support from the new support mechanisms. Other eligible telecommunications carriers will receive, for each qualifying low income consumer served, support equal to the federal SLC cap for primary residential and single-line business connections, plus \$1.75 in additional federal support conditioned on state approval. The federal support amount must be passed through to the consumer in its entirety. In addition, all carriers providing Lifeline service will be reimbursed from the new universal service support mechanisms for their incremental cost of providing toll-limitation services to Lifeline customers who elect to receive them. The remaining services included in Lifeline must be provided to qualifying low-income consumers at the carrier's lowest tariffed (or otherwise generally available) rate for those services, or at the state's mandated Lifeline rate, if the state mandates such a rate for low-income consumers.

Universal Service Order, ¶ 368 (emphasis added).

Likewise, in formulating its initial universal service recommendations to the FCC in 1996, the Federal-State Joint Board on Universal Service (the "Joint Board") determined that the "Lifeline rate" to be made available to qualified, low-income consumers shall be "the carrier's lowest comparable non-Lifeline rate reduced by at least the \$5.25 [now \$8.25] amount of federal support." *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Recommended Decision*, FCC 96J-3, 12 FCC Rcd. 87, 61 FR 63778, ¶ 424 (rel. Nov. 8, 1996) ("Joint Board Recommended Decision").

3. Link Up

The federal Link Up program reimburses ETCs for providing discounted service activation or installation charges to qualified, low-income consumers. Consumers qualifying for

Link Up assistance are eligible to save up to 50% of the first \$60 of the LEC's customary service activation or installation charges (i.e., the subscriber will receive a 50% discount or \$30.00, whichever is less). Qualified, low-income consumers residing on federally-recognized Tribal lands may receive an additional \$70 to defray 100% of the service activation or installation charges between \$60 and \$130. Eligible consumers may also establish an interest-free 12-month deferred payment plan for the remaining activation or installation charges of up to \$200.

D. Sprint's Lifeline Service Offering

In Kansas, Sprint's Lifeline service offering is based on the Company's lowest cost \$29.99 base rate plan, which includes 200 Anytime Minutes and unlimited Night and Weekend Minutes. The calling area for Sprint's Lifeline service offering is national, so Lifeline customers may make outgoing long distance calls without incurring an additional charge. In addition to the FCC-defined Supported Services, Sprint's Lifeline service offering also includes the following enhanced services at no charge to the customer: voice mail, call waiting, caller ID, numeric paging and three-way calling. After applying the total \$13.50⁵ federal Lifeline discount, Sprint customers pay only \$16.49 per month for Lifeline service.

E. The Kansas Lifeline Rule

In October 2005, the KCC commenced an administrative rulemaking proceeding (Docket No. 06-GIMT-446-GIT) to review the adoption of certain additional regulations and

⁵ To enable Lifeline customers in Kansas to receive the full \$13.50 discount, Sprint voluntarily reduces its rate by \$3.50. These "carrier-matching funds" ensure that the Lifeline subscriber will receive \$1.75 in federal Tier 3 matching support. See 47 C.F.R. § 54.409(c) ("[Q]ualifying low-income consumer shall also qualify for Tier-Three Lifeline support, if the carrier offering the Lifeline service is not subject to the regulation of the state and provides carrier-matching funds . . .")

requirements applicable to carriers designated as federal ETC's in Kansas. On October 2, 2006, the KCC released an Order⁶ adopting the following requirement:

ETC's are required to allow Lifeline customers to choose a calling plan and to apply the Lifeline discount to the plan selected by the customer. Any ETC that does not allow customer selection at this time must do so within 180 days [*i.e.*, by March 31, 2007] of the date of this Order.

In other words, the KCC directed all ETC's to apply the federal Lifeline discounts to any calling plan selected by the consumer, rather than a carrier's lowest cost residential rate plan as expressly required by 47 C.F.R. § 54.403(b).

III. ARGUMENT

The Kansas Lifeline Rule violates federal law and must be enjoined for the following three reasons:

1. The Kansas Lifeline Rule is inconsistent and cannot be reconciled with the FCC's universal service rules in violation of 47 U.S.C. § 254(f);
2. Compliance with the Kansas Lifeline Rule would require a federal ETC to inappropriately apply federal low-income universal support to reduce the cost of any rate plan selected by the consumer, rather than the carrier's lowest cost residential rate plan as expressly required by 47 C.F.R. § 54.403(b); and
3. Compliance with the Kansas Lifeline Rule would require Sprint to provide an equivalent monthly Lifeline service discount (*i.e.*, \$13.50) on any rate plan without the ability to recover the discount from the federal universal service support fund. As a result, the Rule would unlawfully regulate Sprint's rates in violation of 47 U.S.C. § 332(c)(3)(A).

⁶ Copies of the Order and the subsequent Order denying motions for reconsideration, are attached as exhibits 1 and 2.

A. Temporary Restraining Order/Preliminary Injunction Standard

The Court is vested with broad discretion in determining whether preliminary injunctive relief should be granted. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998). Pursuant to Federal Rule of Civil Procedure 65, the Court may issue a temporary restraining order and/or preliminary injunction to maintain the *status quo* pending a final determination on the merits. *Tri-State Generation & Transmission Ass'n., Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). A party seeking preliminary injunctive relief must generally demonstrate the following: (1) irreparable harm unless the injunction issues; (2) the threatened injury to the moving party outweighs any damage to the opposing party; (3) the injunction, if issued, will not be adverse to the public interest; and (4) a substantial likelihood of success on the merits. See *Tri-State*, 805 F.2d at 355; *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999); *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991). If the moving party satisfies the first three elements, the standard for meeting the fourth requirement, likelihood of success on the merits, generally becomes more lenient and the moving party "need only show that the issues are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation." *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1221 (10th Cir. 2003); *Winnebago Tribe of Nebraska v. Stovall*, 216 F.Supp.2d 1226, 1231 (D. Kan. 2002), *aff'd*, 341 F.3d 1202.

B. Each Of The Criteria Warranting Preliminary Injunctive Relief Is Decisively Satisfied In This Case

I. Sprint Will Suffer Irreparable Harm If Enforcement Of The Kansas Lifeline Rule Is Not Enjoined

Sprint will suffer irreparable harm if the Kansas Lifeline Rule is enforced. As set forth above, compliance with the Kansas Lifeline Rule would require Sprint to inappropriately apply federal low-income universal support to reduce the cost of any calling plan selected by a Lifeline

(emphasis added). The limited authority delegated under section 254(f) is permissive. If a State commission adopts a regulation that is consistent with the FCC's rules, it may be enforced. However, if the State requirement is inconsistent with the FCC's rules – like the Kansas Lifeline Rule in this case – the State requirement is preempted and unenforceable under federal law.

Sprint is also likely to prevail because the Kansas Lifeline Rule would unlawfully regulate its rates in violation of 47 U.S.C. § 332(c)(3)(A). Compliance with the Kansas Lifeline Rule would require Sprint to provide an equivalent monthly service discount (i.e., \$13.50) to qualified, low-income consumers that subscribe to any of its service offerings, not just Sprint's lowest cost Lifeline service offering. Yet, FCC Rule 54.403(b) would prohibit Sprint from receiving federal Lifeline universal service support to reimburse the Company for providing such discounts. In other words, the Kansas Lifeline Rule is an unfunded mandate that will require Sprint to discount its rates for a particular class of end-users without compensation. This is rate regulation in its purest form.

As a CMRS provider, Sprint's rates are specifically exempt from State regulation. Section 332(c)(3)(A) of the Act prohibits any State action which would effectively regulate the rates charged by a CMRS provider:

[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services

47 U.S.C. § 332(c)(3)(A) (emphasis added). Although a State may petition the FCC, pursuant to 47 C.F.R. § 20.13, for an exemption from section 332(c)(3)(A), the KCC has never done so. The KCC's inaction is fatal. See *WWC Holding Co. v. Sopkin*, 420 F.Supp.2d 1186, 1193-94 (D. Colo. 2006), *appeal pending* (A CMRS provider's status as a federal ETC did not authorize

the State regulatory commission to regulate the carrier's rates. The State commission must first petition the FCC for regulatory authority under 47 U.S.C. § 332(c)(3)(A) and 47 C.F.R. § 20.13).

Accordingly, because the KCC had no authority to adopt the Kansas Lifeline Rule, and because the Rule would effectively regulate Sprint's rates in violation of section 332(c)(3)(A), enforcement of the Rule should be enjoined as Sprint is likely to prevail on the merits.

IV. CONCLUSION

For the forgoing reasons, the Court should preliminarily enjoin the enforcement of the Kansas Lifeline Rule pending a determination on the merits concerning its inconsistency with and violation of federal law.

Dated: March 23, 2007.

Respectfully submitted,

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ATTACHMENT 8

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Sent: Tuesday, May 08, 2007 2:41 PM
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Subject: Activity in Case 2:07-cv-02130-KHV-JPO Sprint Spectrum, L.P. v. Moline et al Order

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ORDER. Pursuant to the parties' stipulation [29], the Court refers this matter to the Federal Communications Commission ("FCC") under the primary jurisdiction doctrine. All matters in the case are hereby stayed pending a decision by the FCC. In light of this ruling, defendants' motion to dismiss [#25] and defendants' motion for leave [27] are hereby overruled without prejudice. The Clerk is directed to close the case administratively. Signed by Judge Kathryn H. Vratil on 5/8/07. (This is a TEXT ENTRY ONLY. There is no pdf document associated with this entry.)(ls)

2:07-cv-2130 Notice has been electronically mailed to:

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